

**Bay Delta Conservation Plan
Governance Working Group
Preliminary Draft Recommendations for Governance Structure
February 16, 2009**

This draft 5 incorporates the Governance Workgroup's Feb. 4th comments on the Feb. 3rd draft 4. The workgroup will continue discussion on these provisions and adaptive management, over the next few weeks, with an emphasis on [bracketed topics].

Permittees

1. A permittee under Endangered Species Act (ESA) section 10(a)(1)(B), the NCCPA section 2835, and California Endangered Species Act (CESA) section 2081 is the non-federal entity authorized to incidentally take listed species for covered activities subject to the conditions stated in the BDCP. ESA section 7(a)(2) provides the basis for incidental take authorization for a federal entity. We use the term "permittee" to refer to the entity that receives such incidental take authorization under any of the foregoing regulatory processes for all or a portion of the BDCP covered activities, including water supply operations.¹
2. California Department of Water Resources (DWR) will be a permittee under Endangered Species Act (ESA) section 10(a)(1)(B) and NCCPA section 2835. *[This is a preliminary recommendation. The Governance Workgroup continues discussion of the alternatives described in point 2.3.]*
 - 2.1. The State of California, through DWR, will construct and own the new conveyance facility.
 - 2.2. Under existing authority, DWR owns the State Water Project's (SWP) existing Delta facilities, including the Banks Pumping Plant.
 - 2.3. The plan will specify whether DWR will be the sole state permittee for the purpose of operating the new conveyance facility, or joint with another entity. *[As reflected below, Governance Workgroup continues to discuss (i) whether DWR will be the sole state permittee, or whether some other public entity under state law (e.g., JPA*

¹ USBR representatives have stated that "permittee" is not an accurate description of USBR's status under ESA section 7(a)(2). The Governance WG will find mutually agreeable terminology as we develop Chapter 7.

The plan activities will also require permitting under laws other than ESA, CESA, and NCCPA. These include: California Water Code sections 1000 *et seq.* (water rights), Water Code sections 13000 *et seq.* (water quality), California Fish and Game Code sections 1600 and 5900 *et seq.* (fish screens, channel modification), Clean Water Act section 404 (dredge and fill), and so forth. *[The Governance Workgroup will continue to discuss how to design governance that will comply with all permitting requirements applicable to plan implementation.]*

of contractors and DWR) may be a joint or alternative permittee for this purpose; and (ii) whether the permit responsibility for operations will run to the same or different entities that have construction responsibility.]

- 2.4. A Joint Powers Authority (JPA) will be established by the SWP and CVP Contractors. *[The SWP and CVP Contractors and DWR continue to discuss whether DWR will be invited to be a member of the JPA, and whether the JPA itself may be a permittee. They expect to report back to the Governance Workgroup shortly.]*
 - 2.4.1. The JPA could assist in implementing habitat conservation measures and other plan elements.
 - 2.4.2. The JPA could be a permittee under ESA section 10(a)(1)(B), NCCPA section 2835, or CESA section 2081, or it may receive regulatory coverage as specified in the BDCP and its implementing agreement.
3. U.S. Bureau of Reclamation (USBR) will receive incidental take authorization under ESA section 7(a)(2).
 - 3.1. USBR will enter into an agreement with DWR to obtain capacity and other rights in the new conveyance facility.
 - 3.2. Under existing authority, USBR owns Central Valley Project's (CVP) existing Delta facilities, including the Jones Pumping Plant.

Implementing Entities

4. NCCPA section 2820(b) provides: "A natural community conservation plan approved pursuant to this section shall include an implementation agreement that contains [specified elements]." This agreement specifies responsibilities of named entities for plan implementation. Similarly, an incidental take authorization under ESA section 7(a)(2), or a HCP, specifies responsibilities for plan implementation. We use the term "implementing entity" to refer collectively to such entities.
 - 4.1. An implementing entity may be a permittee for the purpose of plan implementation.
 - 4.2. An implementing entity may be a contractor with a permittee, engaged to perform specified tasks in plan implementation. In the latter event, its take authorization is derivative of the permittee's, and the permittee oversees its performance.
5. DWR will be an implementing entity under NCCPA section 2820(b). *[As stated in point 3, Governance Workgroup continues to discuss DWR's permit status.]*

- 5.1. The Contractor JPA may be an implementing entity. The BDCP and the implementing agreement will specify its responsibilities
6. USBR will also have responsibilities for implementation as specified in the BDCP and associated incidental take authorization. *[Governance Workgroup continues to discuss what those responsibilities will be.]*
7. A Delta Conservancy, if established, may be an implementing entity for purpose of implementing habitat conservation measures. *[The Governance Workgroup continues to discuss how to structure relationship between permittees and Delta Conservancy.]*
 - 7.1. In any event, Delta Conservancy will be able to accept public funds directly or through another State or Federal agency for implementation of specified measures in BDCP.
 - 7.2. Permittees will have authority to terminate Delta Conservancy's responsibilities under the implementing agreement, if they conclude that its performance does not comply with the plan or otherwise is insufficient. *[Governance Workgroup will discuss further consequence of non-performance related to portions of the plan funded by the State or Federal governments.]*
8. Other public agencies and private entities may also be implementing entities under the same logic described in point 7.

BDCP Implementation Council

9. Stakeholders will participate in an Implementation Council to consult with the permittees, any other implementing entities, and regulatory agencies in the implementation of the plan.
10. The plan and implementing agreement will specify eligibility criteria for membership. Such criteria will cover: (i) permitting agencies, (ii) other members of the BDCP Steering Committee, (iii) Delta Counties and other local governments, and (iv) other stakeholders whose assistance will increase the likelihood of success in implementation.
11. The Implementation Council will have two functions: consultation and dispute resolution between permittees, implementing entities, and other members. *[The Governance Workgroup will continue to discuss the desirability and utility of both functions. As to the first, how should consultation occur to assist (rather than conflict with) (i) permittees' obligation to perform timely and (ii) regulatory agencies' authorities to assure compliance with take authorizations? As to the second function, how should non-binding dispute resolution be structured (i) to have a reasonable prospect of success and (ii) advance, not prejudice, the interests of the participants? Generally, the workgroup will continue to discuss whether these functions would add value to plan implementation, and if so, how to optimize such value.]*

- 11.1. The plan will specify procedures for these functions. These procedures will be designed and implemented to be efficient and specifically to permit the implementing entities to timely implement permit obligations. These procedures may vary by plan element.
- 11.2. Such procedures will fully preserve the existing authorities of any member, including regulatory agencies, to act as required by such authorities. The agencies will not delegate any such authorities to the Implementation Council.
- 11.3. Such procedures will comply with applicable requirements of open meeting laws.
12. The implementing entity(ies) will periodically consult with other council members on past activities and upcoming plans, including (i) operations, (ii) habitat restoration, (iii) strategies for other stressors, and (iv) adaptive management. They will consider member's comments and recommendations.
13. The plan will establish, and the Implementation Council will use, non-binding procedures for dispute resolution between the permittees and council members. Such disputes will concern sufficiency of plan implementation, including the performance of adaptive management. Such procedures will be designed and implemented to minimize the risk and scope of litigation related to plan implementation, while reserving each council's members legal rights related to such litigation.

Coordinated Governance

14. The plan will contain appropriate provisions to reconcile this governance of plan implementation with overall governance of Delta natural resources established pursuant to the recommendations of Delta Vision or otherwise.
15. By separate agreement, the permittees, other Steering Committee members, and other stakeholders may agree to provisions for coordinated regulation of third parties whose facilities and activities affect achievement of plan goals and objectives.